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In the Supreme Court of the United States

OCTOBER TERM, 1978

RONALD R. HUTCHINSON, PETITIONER

v.

WILLIAM PROXMIRE AND MORTON SCHWARTZ, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICI CURIAE OF THE HONORABLE WARREN G. MAGNUSON, PRESIDENT PRO TEMPORE; THE HONORABLE ROBERT C. BYRD, MAJORITY LEADER; THE HONORABLE HOWARD H. BAKER, JR., MINORITY LEADER; THE HONORABLE CLAIBORNE PELL, CHAIRMAN; AND THE HONORABLE MARK O. HATFIELD, RANKING MINORITY MEMBER, COMMITTEE ON RULES AND ADMINISTRATION, OF THE UNITED STATES SENATE ON BEHALF OF THE UNITED STATES SENATE

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The President Pro Tempore, the Majority and Minority Leaders, and the Chairman and Ranking Minority Member, Committee on Rules and Administration of the United States Senate appear here as *amici curiae* on behalf of the United States Senate pursuant to Senate Resolution No. 113[1] and with the

[1] S. Res. 113, 96th Cong. 1st Sess., 125 Cong. Rec. S. 3291 (daily ed. 1979). The Resolution is attached as the Appendix. The letters of consent have been filed with the Clerk's office.

consent of the parties. In addition, the Senate, as an independent house of a co-equal branch of the Government of the United States, asserts its right to appear without consent as an amicus party before this Court pursuant to Supreme Court Rule 42(4).

INTEREST OF THE AMICI CURIAE

This case, against a United States Senator and his aide, involves the fundamental issue of congressional immunity under the Speech or Debate Clause of the U.S. Constitution, Article I, § 6, and the scope of legitimate legislative activity to which absolute immunity under the clause attaches. The issue is fundamental because that clause is the great bulwark guaranteeing an independent legislature and a co-equal branch of government uninhibited or unfettered by incursions from either the Executive or Judicial branches, whether acting in furtherance of their own power or allowing their power to be invoked at the behest of individual or special interest.

The matter is of critical interest because this Court in its examination of the scope of legislative immunity during its 1971 and 1972 terms has made wide pronouncements, beyond the issues of the cases then before it, that: suggest a misunderstanding of how the Congress operates and how its members conduct their business in the representation of their constituents; overlook basic functions of the Congress in investigating and informing necessary to representative government; fail to accord legislative and parliamentary precedent; and which, if unchallenged and uncorrected, may further cause, as they already have, doubts and incursions upon the power of Congress, which erode its independent performance as a body representative of the will of the people.

In short, the Court, at least in its dicta, has cast a "legitimate legislative" role for the Congress and its members narrowed to the formal acts of proposing, debating and enacting legislation, and has tightened the protected perimeter of immunity around this limited activity. Such a pinched view of the functions of Congress is unrealistic and affronts not only Congress' Constitutional powers, but the very basic precepts of democratic government. In Jefferson's words it "is to leave us, indeed with the shadow, but to take away the substance of representation".[2]

The Senate appears here through its own legal representatives rather than by the Solicitor General or by any representative of the Department of Justice because of the inherent conflict with that officer and agency as members of the Executive Branch in a case involving issues of separation of powers. It has in part been through the urging of the Department of Justice that this Court has limited the scope of legitimate legislative activity in *Gravel* v. *United States,* 408 U.S. 606 (1972), and *United States* v. *Brewster,* 408 U.S. 501 (1972), limitations which we now urge be clarified. Moreover, in the context of this case involving investigation and criticism by an individual Senator of wasteful and inefficient spending by three agencies of the Executive Branch, there

[2] *8 Works of Thomas Jefferson* 322 (Ford ed. 1904).

is a direct conflict, since it is the Executive Branch and its agencies, which will benefit by curtailing scrutiny of its activities from a vigilant and uninhibited Congress.

For these reasons, the Senate authorized and engaged counsel to defend Senator Proxmire and his aide from the outset of this action,[3] with instructions to assert the legislative immunity under the Speech or Debate Clause. The Majority Leader of the Senate, Mr. Byrd, has twice reported to the Senate on the process of this litigation through the lower courts.[4] It is with further authorization [5] and grave concern that the Senate now appears in its collective capacity, to assert and urge upon this Court the recognition of a broad but proper scope of legitimate legislative activity, in accordance with the Constitutional mandates of Congressional responsibility, and in harmony with the requirement of separation of powers.

The Senate's appearance as a body in any court is exceedingly rare and it does so now with the greatest

[3] S. Res. 463, 94th Cong., 2d Sess., 122 *Cong. Rec.* S. 9083 (daily ed. 1976). The Resolution states in part as justification: "Whereas the civil action against the Senator from Wisconsin (Mr. Proxmire) seeks damages for actions performed within the scope of a Member of the Senate, duties and responsibilities under the Constitution of the United States . . .".

[4] The matter also came before the Senate in authorization of the Senator and two of his aides to appear in the case for the limited purpose of giving discovery depositions. S. Res. 543, 94th Cong., 2d Sess., 122 *Cong. Rec.* S. 15692 (daily ed. 1976).

[5] Senate Resolution 113, *supra* (Appendix).

reservation, but in recognition of the gravity of the matter before this Court. Once previously the Senate appeared [6] as *amicus curiae* to support the claim of legislative privilege, that time in opposition to the incursions of the Executive Branch. In *Gravel* v. *United States, supra,* the Senate urged the Court to acknowledge the principles: (1) that speech or debate immunity applies to aides acting for members; and (2) that dissemination of information is an essential function of Congress protected by Congressional immunity. As a consequence, the Senate asked that neither the Senator nor his aide be required to appear before the grand jury. The Court only in part accepted this position, recognizing the immunity of aides when acting for members. The Court nonetheless allowed a limited appearance of the aide before the grand jury. Significantly, the grand jury inquiry never proceeded and the aide, Dr. Rodberg, never appeared, making unnecessary further test and strain upon the separation of powers doctrine. Yet another test in a different and less politically charged atmosphere is presented in this case, with an opportunity for the Court to accord and recognize the informing function of Congress, and extend legislative privilege to a member criticizing public spending, and informing the Congress, his constituents, and the public at large as to the merits of that spending. Such open discussion is, as Thomas Jefferson said, a process that must remain "free, full and unawed by any". [7]

[6] That appearance was authorized by S. Res. 280, 92nd Cong., 2d Sess., 118 *Cong. Rec.* 9921 (1972).

[7] Protest in *Cabell's* case, 8 Works of Thomas Jefferson 322 (Ford ed. 1904).

In addition to its appearance here and before the Court in *Gravel*, the Senate has otherwise evidenced its concern over this Court's conception of the role of Congress, and the vital part the informing function plays. Immediately following the disturbing opinions in *Brewster* and *Gravel*, hearings were conducted before the Joint Committee on Congressional Operations on *The Legislative Role of Congress in Gathering and Disclosing Information*, also titled *Constitutional Immunity of Members of Congress.*[8] The presiding officer, Senator Metcalf, in opening the hearings and in comment upon the decisions stated (*Hearings* at 3):

> The Court's definition of legislative activities is a far-reaching institutional challenge.
>
> It threatens the way and the means by which we perform our representative-legislative role.
>
> It threatens the effectiveness, integrity, and independence of our representation of our constituencies.
>
> The Congress must have access to the information resources that are essential to our understanding the need for action and to our formulation of a reasoned response.
>
> And, the Supreme Court, placing the lowest possible value on the free flow of information between Congress and the American people, has announced that you—the American people—and we—the Congress—must act at our peril to exchange information.

[8] *The Legislative Role of Congress in Gathering and Disclosing Information, Parts I and II, Hearings on the Constitutional Immunity of Members of Congress Before the Joint Committee on Congressional Operations*, Mar. 21, 27, 28 and July 19, 1973, 93rd Cong. 1st Sess. (1973) (hereinafter "*Hearings*").

> We cannot receive information from any person and insure the confidentiality of their identity.
>
> We cannot disclose information to the public—in newsletters, speeches, or press releases—without risking the disfavor of the executive or being called to account before the judiciary.
>
> As one commentator concluded, we are insulated from prosecution only when we are isolated from the people.

These hearings included prominent members of Congress, former Justice Arthur Goldberg, professors and constitutional scholars, and representatives from the Department of Justice's Office of Legal Counsel.[9] In addition to testimony, the hearings collected law review articles and opinions on how Congress actually operates. Among its findings the Committee concluded:[10]

> It is the interest of the people—in a legislature that is assured its independence in representing them—that is served by the immunity of legislators for their legislative activities.
>
> The Court has established a narrowed rule of law of legislative immunity in these recent opinions.

[9] Assistant Attorney General Dixon appearing on authority of the Attorney General stressed in his statement that *Gravel* and *Brewster* be read with earlier cases and in light of their holdings, not their dicta. Despite the dicta and recent cases, Dixon urged that the Court does adhere to a broad interpretation of Speech or Debate. Hearings, at 255–256.

[10] S. Rep. No. 93–896, 93rd Cong., 2d Sess. 53 (1974).

> Legislative activities are not limited to the activity of legislating, as the Court has ruled. Legislative activities are, more appropriately, any activities undertaken within the legislative branch in fulfilling the role of the Congress in the constitutionally defined government of coordinate and coequal branches.

Senator Ervin, who appeared before the Committee, later outlined his view of the effects of the Court's decisions:[11]

> As a result of these decisions, the only activities which the Court concedes may be protected from inquiry are the actual proceedings in committee and on the floor of the Congress. The effect of its narrow view of the clause is to cut off the Congress from access to critical information about the doings of the executive branch and to hinder the vital function of publicizing executive action for the benefit of the public's knowledge.
>
> * * * * *
>
> Furthermore, by the removal of legislative immunity from publications, broadcasts, or speeches which seek to inform the public of legislative views, Congress is made not only blind but mute as well. Although words spoken in debate or in hearings are themselves immune, as are the publication of these words in committee prints or the Congressional Record, no republication is protected. The only way the public can learn of information the executive seeks to keep from the people is by reading the actual legislative reports themselves.
>
> * * * * *
>
> In brief summary, the effect of the Court's rulings that acquisition and publication by a legislator are not protected by the "Speech or Debate" clause is a drastic double blow to the concept of separation of powers and to the governmental process. The Court not only cut off the Congress from the executive, but it has cut off the people from the Congress.

[11] Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 Va. L. Rev. 175, 187–188 (1973).

The fears of the Committee and the effect of the dicta have been felt not only in this case and several others which were premised principally on the dicta, but in a challenge to the franking statute.[12] The pendency of this last action prompted another Congressional inquiry, *Communication With Constituents: The Senator's Duty to Inform the People, Report of the Senate Ad Hoc Committee on Legislative Immunity,* Senate Document No. 95–33, 95th Cong., 1st Sess. (1977). That report traces much of the origin, early history and statements of Congressional framers

[12] *Common Cause* v. *Bailar*, No. 1887–73 (D.D.C.) (pending before a three judge court). That case alone has involved months of effort and occupied staff attention in every Senator's office. See *Dickey* v. *CBS, Inc.*, 387 F.Supp. 1332 (E.D.Pa. 1975), *decided on other grounds*, 441 F.Supp. 1133, *aff'd.* 583 F.2d 1221 (3d Cir. 1978), where assertion of Speech or Debate immunity by a Congressman was rejected without examination, based principally on the *Brewster* dicta. *Id.* at 1334. The decision is discussed in Hettinger, *Representative Government, The Constitution and The Case For The Informing Function of Congress*, 3 Journal of Contemporary Law 278 (1977).

quoted in Senator Proxmire's brief here and quoted in several of the early decisions of this Court. The report affirms the duty of a legislator to communicate, the purpose of the frank to facilitate that practice, the long established history supporting authorization of the frank, dating as early as 1789 or nearly contemporaneous with the Constitution's enactment, and excepts to the dicta raised in the recent decisions while noting the burden that such dicta has imposed in the *Common Cause* action.

In presenting this *amicus* brief the Senate adopts the brief and argument made on behalf of Senator Proxmire and his aide, insofar as it argues legislative immunity under the Speech or Debate Clause. By this limitation we do not exclude or except from the First Amendment argument. Indeed, the Senator should enjoy the fullest exercise of First Amendment rights, as should any citizen in commenting upon public issues, and the Court has on occasion drawn some parallel to corresponding or overlapping privileges of Speech or Debate and First Amendment.[13] But our Constitutional interest here is in vindication of legislative immunity under the Speech or Debate Clause and it is this disposition and resolution of the issues that we urge upon the

[13] Such a parallel is drawn in *United States* v. *Johnson*, 383 U.S. 169, 182, n. 12 (1966). See also *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 492 (1975): "Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally."

Court in this case.[14] To Senator Proxmire's brief we add in this brief our particular concerns.[15]

We attempt no detailed recitation of the facts and whether they constituted actionable libel. For our purposes, and in our view controlling for the application of Speech or Debate immunity, are the following facts: (1) the Senator and his staff investigated an issue involving public spending;[16] (2) the Senator in the manner prescribed by Senate rules appeared on

[14] Of course, we take no position of agreement or disagreement with the actual criticism and conclusions contained in the Senator's speech except to state that the issue of public spending, as contained in that statement, is the proper and appropriate concern of every member of the body and the manner in which the Senator spoke before the body and republished his remarks by press release and newsletter conforms to the Rules of the Senate and should be absolutely protected under the Speech or Debate Clause.

[15] We note that the Court in its present term is confronted with Speech or Debate immunity in two other cases involving House members: *Davis* v. *Passman*, 571 F.2d 793 (5th Cir. 1978) (*en banc*), *cert. granted*, 47 USLW 3301 (Oct. 31, 1978) (No. 78–5072); (argued Feb. 27, 1979); *United States* v. *Helstoski*, 576 F.2d 511 (3d Cir. 1978), *cert. granted*, 47 U.S.L.W. 3408 (Dec. 11. 1978) (No. 78–349). We have not participated in these cases. Our attention here is directed to its application in communications with the public and constituents and communications with government officials in matters relating to public spending.

[16] By "public spending" we refer to funds taxed under the authority of Congress, expenditures authorized by the Congress, and funds appropriated by the Congress. See U.S. Const., Art. I, § 8, Cl. 1, the so-called "Taxing-Spending Power" and Art I, § 9, Cl. 7. Every step of that process from public resources to public use of the funds is our business. How they are spent, who receives the funds and for what, and how the funds are used, are all part of the process and thus part of our legislative business.

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the Senate floor and had his speech included in the Congressional Record; (3) the Senator distributed or caused to be distributed, his speech in the manner prescribed by Senate rules to the press and to members of the public he deemed most interested in the issue of public spending; (4) the Senator continued to explore this issue of public spending by further investigation and contact with government officials, inquiring what further spending was intended; (5) the Senator reported to his constituents and to the public in the customary manner and according to Senate rules by newsletter about this issue of public spending; and (6) the Senator reached a larger public audience by television appearance confining his remarks to what he had said and done on the issue of public spending introduced and pending before the Congress.[17]

[17] The decisions below emphasize Senator Proxmire's role as a member of various subcommittees with appropriation and oversight responsibilities over the five executive agencies which were the targets of his criticism. Although understandably committee assignments add to a Congressman's responsibilities and thus focus and direct his attention to certain areas, our rules do not limit the authority of its members to vote, speak, inquire or initiate action on any matter within the general jurisdiction of the body. Indeed, any such limitation would be Constitutionally infirm in restricting the representation of a particular state to the subject matter of its representatives' committee assignments. The committees of Congress may be limited in their subject jurisdiction, but members possess power and privileges co-extensive with every other member, and may not be so limited. We would not narrow the holding in this case to committee responsibility but apply it to every member of the body. Public spending, of course, is at the very core of Congressional business. Every member may vote upon it, comment about it, and place it in the largest possible public form. That is what Senator Proxmire has done and in this he should be protected.

These facts comprise conduct which we believe the Constitution allows and protects. It involves conduct which our rules seek to facilitate. It involves subject matter central to practically all Congressional business and to which we devote the major portion of our time. It involves informing, investigating and oversight functions of the Congress which are inextricably intertwined with legislative functions, particularly when they deal with public spending. It is conduct that must be protected against question in any other place or our independence as a co-equal branch of government is diminished. More seriously, to fail to protect our means of communication and flow of information to the public and our constituents diminishes democratic representative government.

ARGUMENT

THE COURT'S DICTA IN RECENT CASES NARROWING THE FUNCTION OF CONGRESS SHOULD BE RECONSIDERED AND CLARIFIED

The Court in 1972 and 1973 decided three cases involving Speech or Debate immunity. Each holding is based on narrowly presented facts, but also involves conflicting public interests or competing Constitutional rights. *Brewster* v. *United States*, 408 U.S. 501 (1972), held that a U.S. Senator is not immune from criminal prosecution charging him with bribery, since the taking of a bribe is not part of the legislative process; *Gravel* v. *United States*, 408 U.S. 606 (1972) held that a Senator's aide was not immune from subpoena before a grand jury inquiry into criminal conduct of third parties in the private pub-

lication of secret documents; and *Doe* v. *McMillan*, 412 U.S. 306 (1973) held that while Congressmen, their staff members and consultants were absolutely immune under the Speech or Debate Clause in compiling a report and voting for its publication, the Superintendent of Documents and the Public Printer were not *per se* immune in an invasion of privacy suit for publication of the identification of children in a derrogatory context. (On remand and on additional findings the Superintendent and Public Printer were also held immune for limited publication, *Doe* v. *McMillan*, 566 F. 2d 713 (D.C. Cir. 1977).) However, in addition to these holdings, the Court injected dicta of the most profound implications when describing conduct not at issue and not presented in the records of these cases.

We refer specifically to the following comments:

In *United States* v. *Brewster*, 408 U.S. 501 at 512 (1972):

> It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech and Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called "news letters" to constituents, news releases, speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because

> they have come to be expected by constituents and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause.

In *Gravel* v. *United States*, 408 U.S. 606, at 625 (1972):

> But the clause has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity.

In *Doe* v. *McMillan*, 412 U.S. 306, at 313 (1973):

> . . . Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct, 'though generally done, is not protected legislative activity'.

The issues in *Brewster* involved no communications with constituents, neither *Gravel* nor *Doe* concerned legislative contact with agencies of the government.

Accordingly, the Court in *Brewster* observed that in no case had the Supreme Court "ever treated the clause as protecting all conduct relating to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the due functioning of the process". *Id.* at 515–16. A footnote summarized these decisions (*id.* n. 10):

> See *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881) (voting for a resolution); *Tenney* v. *Brandhove,* 341 U.S. 367 (1951) (harassment of witness by state legislator during a legislative hearing; not a Speech or Debate Clause case); *United States* v. *Johnson,* 383 U.S. 169 (1966) (making a speech on House floor); *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967) (subpoenaing records for committee hearing); *Powell* v. *McCormack,* 395 U.S. 486 (1969) voting for a resolution).

But in none of these cases was Speech or Debate immunity withheld from members and none presented factual issues like those described in *Brewster* as outside the scope of the Speech or Debate Clause. In our hearings on Constitutional immunity, Senator Fulbright commented upon this departure from past precedent (*Hearings,* Part 1, at 76):

> Courts, apparently recognizing the need for comity among the three branches of Government, were able to do this by exercising judicial restraint with respect to the speech or debate clause. In affirming a broad scope of legislative acts deemed to be included in the terms of the constitutional provision, the courts necessarily restrained themselves and chose not to enter the legislative arena nor extend their jurisdiction over the actions of Members immediately associated with the legislative process.

To treat the *Brewster, Gravel and Doe* opinions as establishing precedent beyond the bounds then at issue conflicts with the approach estabilshed in *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881). After enunciating the general principle that the clause applied "to things generally done in session of the House by one of its members in relation to the business before it", Justice Miller declined to rule further concerning what was and was not covered (*id.* 204–05): "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. . . . In this, as in other matters which have been pressed on our attention, we prefer to decide only what is necessary to the case in hand. . . ." [18] In fact these decisions, in defining the scope of privilege, threatened to do in their dicta what the Constitutional Convention rejected—statically delineate the scope of privilege

[18] See Justice Stewart's dissent in *Powell* v. *McCormack,* 395 U.S. 486 at 572–73 (1969) citing *Ashwander* v. *TVA,* 297 U.S. 288, 346–348 (1936) (Brandeis, J. concurring): "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is applied' ". 297 U.S. at 347. See also Chief Justice Marshall in *Cohen* v. *Commonwealth of Virginia,* 19 U.S. (6 Wheat.) 264 (1821).

without consideration of the evolving legislative process.[19]

We ask that the Court, having made these pronouncements, now reassess them here in a factual setting where investigation and informing have been used in the manner prescribed by the Senate to inform the public about public spending. In light of the facts and the earlier precedents, as well as the comments of the Constitutional framers, we hope that this Court will agree with the court of appeals that "[i]f the informing function, even though limited, is to be accorded any absolute immunity, it must be in a case such as this." 579 F. 2d at 1033.

In *Brewster* the Court—without reference to any authority—suggested removal of immunity from a vast array of legislative actions with the observation that "it has never been seriously contended that these political matters" are protected by the Speech or Debate Clause. No one had "seriously contended" these functions to be protected, since no one before *Brewster* had ever seriously claimed that they fall beyond the protected sphere.[20] The distinction between "legislative" and "political" conduct adds another source of endless confusion to the appropriate understanding of Congress' activity and the necessary bounds for immunity. All legislative activity is political. Indeed, it should be and when it fails to be such, responsiveness to our constituency or to the democratic process is dead. All political activity by Congressmen may not be legislative, but informing is certainly both. As has been repeatedly pointed out, informing constituents about Congressional activity or public issues is tantamount to the continued maintenance of the democratic process. When a representative's legislative activity ceases to be political then he ceases to represent. To deny Congressional immunity simply because the political label may be attached impairs or injures that process.[21] Congress does police its informing activity to guard against solely "political" uses, but it uses every

[19] J. Butzner, *Constitutional Chaff* at 47 (1941). See Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 Suff. L. Rev. 1, 184–185 (1968)

[20] Shortly after *Brewster*, much of the same conduct was reviewed in Justice Brennan's dissent in *Gravel* v. *United States*, 408 U.S. 606, 652 (1972). The precise issue of Speech or Debate immunity as applied to newsletters and press releases has not been before this Court and there is little authority on the issue. Legislative immunity was held applicable to press releases and circulation of speeches made on a state senate floor in interpreting a state provision nearly identical to Article I, Section 6. *State* v. *Nix*, 295 P.2d 286 (Okla. 1956). See also *Abercrombe* v. *McClung*, 525 P.2d 594 (Hawaii 1974), where legislative immunity was granted to a state senator for a newspaper interview concerning his floor speech. The state Constitutional immunity was ". . . for any statement made or action taken in the exercise of his legislative functions", Constitution of Hawaii, Article III, Section 8. To the contrary is the dicta in *Long* v. *Ansell*, 69 F. 2d 386 (D.C. Cir. 1934) *affirmed on other grounds*, 293 U.S. 76 (1934). In affirming, Justice Brandeis appropriately ignored the dicta on Speech or Debate which had not been raised as a defense.

[21] As to criticism of the legislative/political distinction in *Brewster*, see Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality*, 8 Suff. L. Rev. 1019, 1031, 1041–47 (1974). See also, Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 Va. L. Rev. 175, 186–187 (1973).

conceivable means at its disposal to promote this necessary legislative function.[22]

The implications of reading *Doe* v. *McMillan,* 412 U.S. 306 (1973) for its full import are also pro-

[22] The manner and means in which Congress facilitates the passage of information and their statutory bases are contained in Respondents' brief (see pp. 24–32). See also Justice Brennan's dissent in *Gravel* v. *United States*, 408 U.S. 606 at 650. The Congress not only provides the means for distribution, but it polices its members against abusing these means for purely political purposes, unrelated to any legislative matters. The Congressional standards for use of the frank are contained in 39 U.S.C. § 3210, *et seq.* The statute also contains limiting rules for the mailing of newsletters and press releases, the means at issue here. For example, newsletters and press releases may contain "discussions of proposed or pending legislation or governmental actions and the positions of the Members of Congress on, and arguments for or against, such matters", 39 U.S.C. 3210(a)(3)(B), but they may not include political campaign material (id. 3210(a)(5)(C)). Enforcement and compliance with the limiting rules on the preparation of mass mail and the frank, pursuant to Senate jurisdiction and rule, are assigned to the Senate Committee on Rules and Administration and the Senate Select Committee Standards and Conduct (now Ethics). In addition, the Senate Service Department screens mass mail submitted to it for distribution to the U.S. Postal Service. See Standing Rules of the U.S. Senate, Rules XXV and XLVIII. Distribution by the Senate Service Department, as in this case, helps to insure that the mailed matter conforms with the statutory standards. In any case of dispute or doubt, the matter is submitted to the Select Committee on Ethics as to its statutory compliance. Joint Committee on Congressional Operations, *Congressional Handbook* at 53 (1975). Similarly, Members of the House must get prior approval of all mass mailings under the frank. Rule XLVI(3), Rules of the House of Representatives (1977). Any misuse of the frank falls within the jurisdiction of the House Commission on Congressional Mailing Standards and the Senate Select Committee on Ethics. See 2 U.S.C. §§ 501, 502.

foundly disturbing. While the Court protected all of the conduct of legislators in their collection, reporting and distribution of materials, it withheld a *per se* application of immunity to the Superintendent of Documents and the Public Printer, who were implementing the informing function dictated by Congress. On remand the district court and the court of appeals examined the facts of distribution and found that the distribution was "'routine and ordinary' and quite limited in scope" and therefore entitled to immunity.

The holding in *Doe* v. *McMillan,* 412 U.S. 306 (1973) adds to our concern of whether the Court fully appreciates the breadth of our legislative function. By withholding immunity for distribution of official material produced by Congress and intended for public consumption, the Court tends to isolate us from the public. Such isolation denies to legislators a necessary contact with the public not only in order to inform the electorate but through its response to fulfill its role in the legislative process. In the words of Justice Rehnquist, the decision comes close to imposing the "mischievous possibilit[ies] of censorship" by one branch of the Government upon the other, *id.* at 344.

In the interest of protecting privacy, the Court withheld an automatic or *per se* application of Speech or Debate immunity for the distribution of a Congressional report absent a showing that the distribution was within "the apparent needs of the *'due* functioning of the [legislative] process' ". *Id.* at 317.

The majority opinion suggested that merely a limited internal distribution was necessary (*ibid.*):

> To the extent that the Committee report is printed and internally distributed to Members of Congress under the protection of the Speech or Debate Clause, the work of Congress is in no way inhibited. Moreover, the internal distribution is "public" in the sense that materials internally circulated, unless sheltered by specific congressional order, are available for inspection by the press and by the public.

What is the distinction for purposes of immunity between the press or public digging out information deemed public and the Congress making it broadly available? The concept of limited distribution within "the halls of Congress" is antithetical to democratic government and runs counter not only to our Constitutional mandate to make open and public what we do, but the exercise of that mandate in making the broadest possible circulation of Congressional material so that all will know the actions of their government.

The purpose of public distribution and the public role in legislation is better understood and described in the opinion of Justice Blackmun (*id.* at 332):

> Each step in the legislative report process, from the gathering of information in the course of an officially authorized investigation to and including the official printing and official distribution of that information in the formal report, is legitimate legislative activity and is designed to fulfill a particular objective. More often than not, when a congressional committee prepares a

> report, it does so not only with the object of advising fellow Members of Congress as to the subject matter, but with the further objects (1) of advising the public of proposed legislative action, (2) of informing the public of the presence of problems and issues, (3) of receiving from the public, in return, constructive comments and suggestions, and (4) of enabling the public to evaluate the performance of their elected representatives in the Congress.

Informing in this sense is truly legislative. It makes, to the extent possible, members of the public genuine participants in the legislative process. Justice Blackmun's description corresponds very closely to what Senator Proxmire has described as his purpose in informing by press release and newsletter of the actions he has taken on the floor of the Senate. (A. 139–141.)

The impact of *Doe* was ominously but accurately forecast by Justice Blackmun when he speculated as to its implications upon the distribution of the Congressional Record (*id.* 336, n. 8):

> An interesting dilemma is presented by the possibility of an injunction against distribution where "otherwise actionable" material is printed in the Congressional Record. The Court recognizes the existence of this problem and reserves its resolution for another day. *Ante*, at 325 n. 16. The Congressional Record, however, receives wide public distribution on a regular basis and it is not an uncommon occurrence for all or part of a committee report or other document to be read into the Record by a Member of Congress. In light of the

> Court's holding in this case, it is conceivable that, in lieu of separate publication as a committee document, a committee report containing possibly actionable material hereafter will be printed in the Record in order to effectuate public distribution. It appears to me almost beyond question that an injunction against the distribution of the Congressional Record is clearly precluded by the Speech or Debate Clause and by the Constitution's Art. I, § 5, cl. 3, providing that "[e]ach House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy."

Subsequent rather than prior restraints are involved in this case, but the Court should remove *any* restraints which impinge upon the authorized distribution of Congressional material. To do otherwise is to alter the form and substance of our government.

On remand in *Doe*, the district court and the court of appeals readily seized upon the escape route offered by the majority, in finding that routine distribution of the committee report to libraries, embassies, and the public served a legitimate legislative need and was therefore within the privilege, *Doe* v. *McMillan*, 566 F. 2d 713 (D.C. Cir. 1977), *cert. den.*, 435 U.S. 969 (1978). In doing so, the appeals court threaded through the *Doe* majority, concurring and dissenting opinions and found the common ground of recognizing "that the Congress possessed some 'informing function' . . . [and] that informing the public concerning matters before Congress was a 'legitimate function' ". (*Id.* at 717.)

As to the limited distribution outside Congress to those on standard distribution lists with a general interest in all matters before Congress, the appeals court found this distribution also necessary to the legislative process (*id.* at 718):

> Distribution of such reports informs the public and permits them to comment on pending matters. It permits individuals and companies who consider their interests to be affected to take steps to exercise their constitutional right of petition. The right to petition is one of the freedoms protected by the First Amendment of the Bill of Rights. . . . The right to petition would be meaningless if proceedings in Congress were not publicly available. . . . Restricting distribution of committee hearings and reports to Members of Congress and the federal agencies would be unthinkable. . . . This is merely one illustration of the need to make such reports generally available to the public.

While cautiously presenting the findings ordered on remand, the court of appeals has in effect broadly affirmed the necessity of public distribution and the informing function as a necessary link in the legislative process. To Speech or Debate protection it added the right of petition as a basis for the open exchange of information. We urge that this Court apply Speech or Debate protection to the fullest degree in protecting the communicating of legislative business to the public as a necessary foundation of our government and as insured by our Constitution.

In its most recent review of Speech or Debate immunity in *Eastland* v. *United States Servicemen's*

Fund, 421 U.S. 491 (1975), the Court has reaffirmed its strong adherence to legislative privilege: "Without exception, our cases have read the Speech or Debate Clause broadly to effectuate its purposes". The Chief Justice's opinion explains that the purpose of the clause is "to insure that the legislative function the Court allocates from Congress may be performed independently", and the clause serves the additional function of reinforcing the "separation of powers" doctrine. The majority also observed that "the wisdom of Congressional approach is not open to judicial veto." The five-man majority is joined by three justices in concurrence, who make particular mention of the informing function by Congress as legitimate legislative activity. *Id.* at 515. Only Justice Douglas dissented. In our view the most recent pronouncement is the proper approach to Speech or Debate and a return to its traditional interpretation. The Court need only apply this interpretation to the facts at hand and recognize a protected right and interest of a Congressman in criticizing public spending through distribution of his speeches and by communicating with his constituents.

We do not intend to review here the history and precedents of Speech or Debate immunity. Those precedents have already been set forth to the Court in other cases and are contained to a large degree in this Court's decisions from *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881), through *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975). They are elaborately reviewed in the materials assembled

for our hearings on Constitutional immunity.[23] It is sufficient for our presentation to quote our report:[24]

> Having come, then, from *Kilbourn to Dombrowski*—the Court's determination of the scope of legislative immunity under the Speech or Debate Clause and the persons to whom that immunity applied was characterized by language such as immunity being applicable "to things generally done in a session of the House by one of its members in relation to the business before it" (*Kilbourn*) and that "legislators engaged 'in the sphere of legitimate legislative activity,'" (*Tenney*) "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves" (*Dombrowski*) and be free in the discharge of the legislative duties of office from "intimidation by the executive and accountability before a possibly hostile judiciary." (*Johnson.*)

Those cases presented a formidable bar against questioning in any other place. The divided opinions and shifting majorities in *Brewster, Gravel* and *Doe* erode much of the certainty of that bar even though confidence has been partially restored by the near unanimity of the Court in *Eastland*. The instant case presents a new opportunity to re-examine the role of Congress in its informing, investigative, and oversight functions and to reaffirm that this Congressional business is immune from attack or questioning in any other place.

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[23] *Hearings*, *supra* n. 8.

[24] S. Rep. No. 93-896, 93rd Cong., 2d Sess. 14 (1974).

Two historical precedents of particular significance and application to the case here should be dispositive of the question whether to affirm protection for the conduct of Mr. Proxmire. We refer to the case of Sir William Williams,[25] whose conviction for *distributing* reports of Parliament directly led to the English Bill of Rights Speech or Debate Clause from which our own is borrowed. Mr. Proxmire's distribution of speeches from the floor relating directly to the business and concerns of that body—government spending—is closely analogous.

Secondly, we refer to *Cabell's* case,[26] the inquiry into the distribution of newsletters of a representative to his constituents critical of executive action. The petition of Jefferson and Madison rejecting this inquiry as an intrusion upon the legislative function was successful in halting the inquiry.

The precedent of that case, so early after the adoption of the Constitution, is of the greatest significance here—Congressmen must be protected in their communications with their constituents when they confer with them about the government's business and must not be questioned in any other place. The Senate and House have recognized this obligation by facilitating this communication and information. The Court should also recognize this informing function and accord to its exercise the highest measure of protection afforded with Speech or Debate immunity. A weakened legislative immunity undermines the separation of powers doctrine, impairs the openness of government which we have so diligently tried to achieve—not only for our own branch, but for the Executive—casts doubt upon the protection of our Constitutional mandate to keep our proceedings open, makes hollow the right of our citizens to petition their representatives with just grievances, and in short, challenges the very basic pillars of democratic government. It is because of these grave concerns that we urge upon the Court a renewed affirmance of Congressional immunity embracing the informing and investigative functions of Congress.[26]

[25] 13 How. St. Tr. 1370 (1684–1695).

[26] See Jefferson-Madison Petition in *8 Works of Thomas Jefferson* 322 (Ford ed. 1904).

The Senate urges that the Court in its review of this petition reaffirm the historical reach of the doctrine of Congressional immunity; recognize Speech or Debate immunity for newsletters, press releases, and public statements by Members of Congress on matters pending before or of interest to the Congress; and recognize Speech or Debate immunity for communications with the Executive Branch on matters pending before or of interest to the Congress.

[26] Of no less importance in the legislative process is the performance of investigative and oversight functions. Both of these functions relate to communication with constituents. All legislation starts with some information, some concern or knowledge by an individual Congressman. From his requests—most often to the Executive Branch—more information is developed to the point where formal committee action is taken through hearing, followed by drafting, mark-up, and enactment of legislation. Investigation and oversight are more fully treated in Senator Proxmire's brief and in the *amici* brief on behalf of the Leadership of the House,which we do not repeat but adopt by reference.

CONCLUSION

For the foregoing reasons, the Senate prays that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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MARCH 29, 1979.

APPENDIX

S. RES. 113

In the Senate of the United States

March 22, (legislative day, February 22), 1979.

Whereas the Supreme Court of the United States on January 7, 1979, issued a writ of certiorari in the case of Hutchinson v. Proxmire, et al.; and

Whereas this civil action against the Senator from Wisconsin (Mr. Proxmire) seeks damages for actions that were performed within the scope of the Senator's duties and responsibilities as a Member of the Senate under the Constitution of the United States; and

Whereas the Senate, by Senate Resolution 463, Ninety-fourth Congress, has supported the defense of Senator Proxmire in defending the civil action brought against him for the purpose of protecting the interests of the Senate; and

Whereas in this case the Supreme Court will consider the scope and meaning of the protection provided to Members of the Congress by Article I, Section 6, of the United States Constitution, the Speech or Debate clause, including the application of this provision to Senators and their aides, and the types of activity protected; and

Whereas this case involves the informing function of the Congress and the right of Members of the Senate to inform their constituents, colleagues, and the public; and

Whereas this case involves the investigation and oversight functions of the Congress and the right of the Members of the Senate to obtain information in their contact with the executive branch of the Government; and

Whereas the District Court and the Circuit Court of Appeals have recognized the application of the Speech or Debate clause to the conduct complained of in this case; and

Whereas a decision in this case may impair the constitutional independence and prerogatives of every individual Senator, and of the Senate as a whole; and

Whereas the Senate of the United States has a responsibility to insure that its interests are properly and completely represented before the Supreme Court: Now, therefore, be it

Resolved, That there is established a committee of the Senate consisting of the President pro tempore of the Senate, the Majority Leader and Minority Leader of the Senate, and the chairman and ranking minority member of the Committee on Rules and Administration. Such committee is authorized and directed to appear and/or to file, on behalf of the Senate of the United States, a brief as amicus curiae in the case of Hutchinson v. Proxmire et al., now pending in the Supreme Court of the United States.

SEC. 2. The Secretary of the Senate shall transmit a copy of this resolution to the Supreme Court.

Attest:

Secretary.

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